No. 14,659

IN THE

United States Court of Appeals

For the Ninth Circuit

HERALD E. STRINGER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court, Territory of Alaska, Third Division.

BRIEF OF APPELLANT.

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BRIEF OF APPELLANT.

I.

JURISDICTIONAL STATEMENT.

An Information was filed in the District Court of the Territory of Alaska charging the appellant as an attorney at law with various acts of professional misconduct in connection with his conduct of the defense of a person charged with crime and the fee charged for his services.

The Information was filed on September 24, 1953, and appears in the Transcript of Record on Appeal, Vol. I, pp. 1 to 5 inclusive.

The Motion to Dismiss and Answer to the Information were filed October 14, 1953, and appear in Vol. I of the Transcript, pp. 49 to 55, inclusive.

After a trial in the District Court for the Territory of Alaska, Third Division, judgment was rendered against appellant whereby, in the words of the judgment, it was

> "Ordered and Adjudged that Herald E. Stringer be deprived and suspended of the right to practice law in all of the courts of this Territory for a period of one hundred and twenty (120) days."

The judgment was rendered on October 8, 1954. Tr. Vol. I, p. 140.

On the same day a stay of execution pending appeal was granted. Tr. Vol. I, p. 141.

Notice of Appeal was filed October 20, 1954. Tr. Vol. I, p. 146.

The District Court had jurisdiction of the case by virtue of Secs. 35-2-71 to 35-2-76 of the Alaska Compiled Laws Annotated 1949.

The appellate Court has jurisdiction by virtue of new Title 28 U.S.C.A. Sec. 1291 and Sec. 1294(2).

II.

STATEMENT OF THE CASE.

1.

Facts and Circumstances.

At the time of the events hereinafter narrated, the appellant, Herald E. Stringer, was an attorney at law practicing his profession at Anchorage, Alaska.

On May 6, 1952, one Robert Lee Kemp, a taxi driver in the employ of the Radio Cab Company, was in the Federal jail in Anchorage, having been arrested the previous night on a charge of transporting a woman for the purpose of prostitution, in violation of what is known as the White Slave Act.

On either May 6 or 7, 1952, at the instance of one or more of the owners of the Radio Cab Company of Anchorage, appellant visited Kemp at the jail and was employed by Kemp to effect his release on bail, and for no other purpose. The appellant performed this service, for which he was paid a fee of $100.00. Kemp was released on May 7, 1952, on $2,500.00 bail. This terminated the relation of attorney and client.

On May 8, 1952, Kemp called at the appellant's law office for the purpose of retaining appellant to defend the white slave charge. After a general discussion of the facts and circumstances leading to Kemp's arrest, he was informed of the gravity of the offense charged, the possibility of indictment and conviction and the consequent penalties provided by statute. Also, certain aspects of the case were mentioned which might make it possible to secure a dismissal of the charge.

It was agreed at that time between the parties that appellant would undertake the defense of the criminal charge for a flat fee of $2,500.00 and would render all legal services throughout all proceedings in the case, up to and including a trial in the District Court, if necessary. The fee was to be $2,500.00 regardless of the outcome of the case or whether it was disposed of by a dismissal, plea or trial.

It was further agreed between the parties that the $2,500.00 fee was to be paid as follows: $500.00 down and the balance of $2,000.00 as soon as possible, and in any event before trial or other disposition of the case. Upon the agreement being concluded, appellant was paid $100.00 on account of the $500.00 retainer and assured that the balance would be paid shortly, or at least in a few days. Between that day, the 8th, and June 18, 1952, an additional $350.00 or $400.00 was paid by Kemp.

The foregoing statement of facts regarding the circumstances of the employment of appellant Stringer by Kemp is based upon the testimony of appellant and his witnesses in the trial of the case in the District Court.

Some of the facts as above narrated are in dispute. The testimony of the government witness, Robert Lee Kemp, was that when appellant called on him at the Federal jail with regard to the matter of bail, he retained appellant for the defense of the criminal charge against him, and that a fee of $500.00 was agreed upon and a retainer of $100.00 paid, and that thereafter, on May 8 or 9, 1952, while the relation of

attorney and client existed between appellant and Kemp, appellant exacted an agreement from him that he pay an additional fee of $2,000.00 in the event appellant effected a dismissal of the case and kept it out of court.

It is undisputed that a total fee of $2,500.00 was agreed upon between the parties, of which, according to the government's testimony, $2,000.00 was contingent upon the criminal case being dismissed and kept out of court, but according to the testimony for appellant, no part of the fee was contingent.

It is also undisputed that appellant did effect the dismissal of the criminal case on June 18, 1952, and that Kemp, between May 8, 1952, and June 18, 1952, paid appellant either $350.00 or $400.00 in addition to the $100.00 paid in appellant's office, and also on June 17 or 18, 1952, and as security for the $2,000.00 balance of his fee, gave appellant two promissory notes for $1,000.00 each, one signed by Kemp without endorsers and payable on demand, and the other signed by Kemp with guarantors. The latter note was payable in monthly installments of $100.00 each, commencing August 1, 1952. No payments or demands for payment were made on either note until the following year.

In July 1953 the appellant sent for Kemp and payment of the notes was discussed and an agreement was made that Kemp should pay $75.00 per week, and in the course of about a month, Kemp did pay a total of $215.00. Following this, Kemp made no further payments, but consulted legal counsel, inform-

ing the attorneys consulted that it was a part of his original contract with appellant that his chauffeur's license, which had been taken from him by the police department, would be restored upon the dismissal of the criminal case, and claiming that the contract had not been performed. Kemp retained one Roger Cremo for the defense of a possible civil suit for the balance of appellant's fee. Cremo went to the United States Attorney's office in Anchorage to investigate the merits of the criminal charge against Kemp and matters connected therewith, and was requested to send Kemp to the office. Shortly thereafter Kemp was interviewed by an Assistant in the United States Attorney's office, one Arthur D. Talbot. Talbot interviewed Kemp at great length—altogether for some fifteen hours—and also interviewed the parties who had guaranteed payment of the installment note, and as a result of his investigation, on September 15, 1953, caused an Information to be filed against appellant similar to the Information on which this case was tried in the District Court.

On September 22, 1953, appellant caused the depositions of Kemp and one James M. Lewis to be taken on this first Information, which resulted in an abandonment of the first Information. The Information on which this case was tried in the District Court was filed September 24, 1953.

Talbot was not employed in the United States Attorney's office during the time that the complaint against Kemp, charging him with white slavery, was filed and dismissed.

The case came on for trial in the District Court for the Territory of Alaska, Third Division, on June 17, 1954, and ended June 30, 1954. Following argument, written briefs were submitted.

Government's Brief, Tr. Vol. IV, pp. 953-968;
Defendant's Brief, Tr. Vol. IV, pp. 970-992.

Thereafter the Court filed a written Opinion, Tr. Vol. I, pp. 108-133, and Findings of Fact and Conclusions of Law, Tr. Vol. I, pp. 134-137. Judgment was rendered as stated in the Jurisdictional Statement.

2.

Questions Involved and How Raised.

(1)

Insufficiency of the Evidence to Support the Findings of Fact.

(2)

Irregularity in the Proceedings of the Court and Misconduct of the Court, whereby the Defendant was Prevented from Having a Fair Trial.

The questions as to the insufficiency of the evidence were raised by exceptions duly taken to the Findings of Fact at the time they were filed, and are now raised in accordance with the provisions of Rule 52 (b) of the Federal Rules of Civil Procedure.

The questions as to the irregularity in the proceedings of the Court and misconduct of the Court are for the first time raised on this appeal.

For the convenience of the Court in hearing the appeal on a four-volume typewritten transcript of

the record, the Findings of Fact and Conclusions of Law are hereunto appended.

Findings of Fact.

I.

That Herald E. Stringer is, and at all times herein mentioned, has been an attorney at law, duly admitted to practice in all of the Courts of this Territory.

II.

On or about the 8th day of May, 1952, there was a contract entered into between the defendant Herald E. Stringer, and Robert L. Kemp, the basis of which was that the defendant would represent Robert L. Kemp on a white slavery complaint which had been filed against Robert L. Kemp for the sum of $500.00, and further, this contract was made when the defendant went to the Federal jail and discussed the case with Robert L. Kemp and Pat Rollins. Defendant was at that time paid $100.00 of the $500.00 fee.

III.

There was a second fee set by the defendant in the sum of $2,500.00 in the defendant's office, the exact time being in dispute.

IV.

That Robert L. Kemp was led to believe that one fee would be charged to settle the case out of court, where another would be exacted if the

case went to trial, thereby implying at least that it would take a greater amount to keep the case out of Court than to try the case in Court.

V.

That the relationship of attorney-client was established between the defendant and Robert L. Kemp at the time the defendant visited Robert Kemp in the Federal Jail.

VI.

That there was an overreaching of Robert L. Kemp by the defendant, by the defendant taking advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship.

VII.

That one James Lewis who was part-owner of the Radio Cab Company for whom Robert L. Kemp worked, and who was the dispatcher of the company at the time the original incident occurred, acted for the defendant in his dealings with Kemp.

VIII.

The defendant, in violation of the trust and confidence of his client, knowingly failed to advise his client concerning the status, merits and probable outcome of his client's case.

Conclusions of Law.

I.

That the relationship of attorney-client had been established at the time the defendant visited Robert L. Kemp in jail and subsequent to that time, the defendant stood in a fiduciary relationship with the client.

II.

Where the relationship of attorney-client is already established, the attorney has the burden of proof of fairness and good faith in setting a fee.

III.

The setting of a fee of $2,500.00 was in violation of the fiduciary relationship which existed between the defendant and Kemp by reason of the prior contract between the defendant and Kemp.

IV.

The $2,550.00 which defendant charged his client was grossly excessive in that it bore no possible relation to the amount of work done by the defendant, the benefits obtained for the client, or the client's ability to pay.

V.

The fee of $2,550.00 was not commensurate with the true value of the services rendered.

VI.

In securing Robert L. Kemp's agreement to pay a fee of $2,550.00, the defendant was guilty of unconscionably overreaching his client.

VII.

By his conduct, the defendant tended to bring the legal profession as a whole into disrepute and to undermine the public confidence in the administration of criminal justice in the Territory of Alaska.

VIII.

The defendant has not shown that he possesses the sense of duty to his profession that the Court and the public are entitled to expect of him.

IX.

That Herald E. Stringer, the defendant herein, be deprived and suspended of the right to practice law in all of the courts of this Territory for a period of One Hundred and Twenty (120) days.

III.

SPECIFICATIONS OF ERROR.

1.

Errors in Findings of Fact.

The District Court erred in its Findings of Fact as follows:

(1) There was insufficient evidence to support Finding of Fact II, in that the clear preponderance of the evidence established that no contract was entered into between the defendant, Herald E. Stringer, and Robert L. Kemp, in the Federal jail, on or about May 8, 1952, or at any time, by the terms of which the defendant agreed to represent Robert L. Kemp in defense of a charge of white slavery, for the sum

of $500.00, or at all; and in that the evidence clearly established that the defendant, Herald E. Stringer, was employed by Robert L. Kemp in the Federal jail for the purpose of effecting Kemp's release on bail, and for no other purpose, for which service the defendant was paid $100.00, and which service the defendant performed.

(2) There was no evidence whatever in support of Finding of Fact III.

(3) There was no evidence whatever in support of Finding of Fact IV. That Finding of Fact IV does not purport to state any act done by the defendant or with his consent, approval or ratification.

(4) There was insufficient evidence to support Finding of Fact V, except insofar as the relationship of attorney and client was established with regard to the services to be performed by the defendant in securing the release of Robert L. Kemp on bail.

(5) There was no evidence whatever in support of Finding of Fact VI, in that the evidence established that the contract entered into between the defendant and Robert L. Kemp for the defense of the white slave charge against Kemp was fair and reasonable, and in that there was no evidence to the contrary, and in that there was no evidence whatever that the defendant took advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship.

(6) There was no evidence whatever in support of Finding of Fact VII, in that the evidence clearly established that James Lewis acted for Robert L.

Kemp in his dealings with the defendant, and there was no evidence to the contrary.

(7) There was no evidence whatever to support Finding of Fact VIII, in that the evidence clearly established that the defendant did not violate the trust and confidence of his client, but constantly kept his client advised concerning the status, merits and probable outcome of his client's case, and in that there was no evidence to the contrary.

2.

Errors in Conclusions of Law.

Conclusions of Law I and II afford no basis for a judgment against the defendant, Herald E. Stringer. Conclusion of Law III is erroneous for the reason stated in Specifications of Error No. 4.

Conclusions of Law IV and V are erroneous in that they were not deduced from any Finding of Fact, and in that the evidence clearly established that the contract between Robert L. Kemp and the defendant, for the defense of Kemp on the criminal charge, was made while there was no relation of attorney and client between the parties and while they were dealing at arm's length; and in that the fee agreed upon was for all services it might be necessary to perform in the case.

Conclusion of Law VI is erroneous for the reasons stated in Specification of Error No. 5.

Conclusions of Law VII and VIII are erroneous in that they are based upon ill-founded Findings of Fact, and are not justified by any evidence in the case.

Conclusion of Law IX is written in the words of the judgment, Tr. Vol. I, p. 140, and is erroneous in that it is not justified by any evidence in the case.

3.

Errors in Conduct of Trial.

The irregularities in the proceedings and misconduct and acts of the Court upon which error is assigned are specified in Paragraph IV of the Statement of Points upon which appellant relies on his appeal as follows:

1. The trial judge assumed to act both as judge and prosecutor in his conduct of the trial, as appears from the Transcript of Proceedings on Trial.

2. The trial judge exhibited bias and prejudice against the defendant throughout the trial of the case, as appears from the Transcript of Proceedings on Trial.

3. Disqualification of trial judge: The trial judge failed to disqualify himself from trying the case as required by the provisions of Section 455 of Title 28 U. S. Code, by reason of being so connected with the defendant as to make it improper, in his opinion, for him to sit on the trial, all of which fully appears from the Memorandum Opinion dated March 4, 1954, Tr. Vol. I, p. 58, filed March 5, 1954, and from the excerpt of Proceedings, filed June 23, 1954, Tr. Vol. I, p. 152, both being contained in the Record on Appeal.

IV.

ARGUMENT.

1.

ON FINDINGS OF FACT.

Findings of Fact II, III, IV and V all relate to the same subject matter and will be discussed together.

In Finding of Fact II the Court finds that on or about May 8, 1952, the defendant, Herald E. Stringer, contracted with Robert L. Kemp to defend him on a criminal charge for a fee of $500.00, of which $100.00 was paid down, and that this contract was made between Stringer and Kemp in the Federal jail. Tr. Vol. I, p. 134.

Robert L. Kemp testified positively in support of Finding of Fact II, Tr. Vol. II, pp. 267 to 269.

Kemp was corroborated by Vernon Oscar Rollins, commonly called Pat Rollins. Tr. Vol. IV, pp. 856, 857, 859, 861, 863.

Kemp's testimony is rendered unbelievable by his further testimony in the record. Tr. Vol. II, pp. 318, 319, 320, 321, 324, 326.

Kemp testified that after he got out of jail and before he went to Stringer's office, he went to the Radio Cab office and talked with James Lewis about an attorney to defend him. He testified as follows:

> Q. Did you go to the Radio Cab office after you got out of jail before you went to Stringer's office?
>
> A. Yes, sir.
>
> Q. And then at that time you talked with Mr. Lewis?

A. Yes, sir.
Q. About an attorney to defend you?
A. That is quite correct.
Tr. Vol. II, pp. 318, 319.

Q. Anyhow, you went down to Radio Cab to talk with Lewis about who to hire as your attorney, didn't you?
A. That is correct.
Tr. Vol. II, p. 324.

The Court summarizes the testimony in this regard as follows:

"Kemp further testified that he was not acquainted with any attorney and that he went to the office of the Radio Cab Company where James Lewis worked, and asked him what he should do about employing counsel. . . ."
Court's Opinion, Tr. Vol. I, p. 113.

This Court will note that at no time during his conversation with Lewis at the Radio Cab office before going to Stringer's office, nor on the way to Stringer's office, did Kemp make any allusion to having already employed Stringer to defend him for a fee of $500.00, although there was every occasion for him to have mentioned it. Instead of proceeding to Stringer's office to consult him regarding the case as his employed attorney, as he claims, according to his own testimony he goes to the Radio Cab office to get the advice of Lewis, his employer, about whom to hire, and did discuss this matter fully with Lewis, even being told, as he claims, the reasons why Stringer should be employed and the possible cost of his services.

If he had already employed Stringer for a stipulated fee, he certainly would have at least mentioned it. The inevitable conclusion is that there was no contract made in the Federal jail for the defense of the case.

Although Rollins corroborated Kemp on his direct examination, he absolutely went to pieces on cross-examination. Rollins was one of the owners of the Radio Cab company. Kemp had called him in Cordova to come to Anchorage as a witness. Tr. Vol. IV, pp. 864, 867, 868, 874, 875, 876.

Rollins testified that he was present at a meeting in the jail between Robert Kemp and Mr. Stringer and took part in the discussion held at that time; that the conversation was so long ago that he could not truthfully state what the conversation was; that he could definitely remember the retainer fee; that $200.00 was supposed to have been the original retainer fee, but that maybe it was just $100.00 and that sum was supposed to be a retainer on $500.00; that the $500.00, as far as he understood, was supposed to be Stringer's fee for defending the case. On cross-examination Rollins testified as follows:

> Q. Then you are sure this $500.00 was mentioned over at the jail?
>
> A. The $500.00 had been mentioned to me, yes.
>
> Q. Mentioned at the jail or mentioned to you by Lewis?
>
> A. If the total of $500.00 was mentioned at the jail or not I will not swear to that one way or the other.
>
> Q. It may have been mentioned either before or shortly after the jail?

A. It could have been.

Q. I see. Well, now——

A. It was mentioned to me prior to the time I went to the jail.

Q. And it was mentioned to you by Mr. Lewis?

A. Right.

Q. Couldn't have been mentioned by Mr. Kemp because he was in jail?

A. He was in jail.

Tr. Vol. IV, p. 868.

Q. Well, just reading that portion of the transcript then, Mr. Rollins, are you of a firm impression which I believe you stated previously that the $500.00 you may have heard, the $500.00 mentioned, either just before going to the jail or at the jail or just after?

A. *I heard the $500.00 prior to going to the jail.*

Q. I see. Did you hear it from Mr. Stringer?

A. Jim Lewis.

Q. All right.

Q. (By the Court) That is your considered opinion, is it?

A. Yes, sir.

Q. (By the Court) And what has caused you to testify now that you heard that from Jim Lewis?

A. Jim Lewis was the only person that could have told me. Mr. Stringer did not tell me, and as he sent me up there with the $100.00 or to go up there for the retainer fee he is the only person I could have heard it from.

Tr. Vol. IV, p. 875.

Rollins came to Anchorage from Cordova at the request of Kemp and was disposed to aid Kemp in

every way possible, as is evident from his testimony. He succeeded not only in rendering his own testimony on direct examination worthless, but also succeeded in utterly destroying Kemp's testimony as to Stringer being employed in the Federal jail for the defense of the case.

Kemp's testimony is further weakened by the fact that he was impeached by witnesses of the highest repute. James H. Chenoweth testified that he was the Chief Deputy U. S. Marshal of the Third Division of the Territory of Alaska; that Kemp's general reputation for truth and veracity was very bad; that Kemp's general reputation as to his moral character was also very bad. Tr. Vol. III, pp. 541, 543.

Chenoweth also testified as follows:

> Q. All right, I will ask you this question: While you and Robert Lee Kemp were simultaneously employed by Radio Cab Company did he or did he not at any time in a conversation with you brag or state the number of meat-hauls which he had made during a previous shift?
>
> A. He did.
>
> Q. And what did you understand or what do you know to be meant by the words "meat-haul"?
>
> A. A meat-haul in cab driver's vernacular is any trip of cab transportation in which a prostitute is either carried to location of her subject or a person seeking services of a prostitute is carried to location of the prostitute.
>
> Tr. Vol. III, p. 547.

Kemp refused to deny that he talked to Chenoweth about meat-hauls. He testified as follows:

That he knew Chenoweth, now Assistant U. S. Marshal, at one time a driver for Radio Cab. Tr. Vol. II, p. 346. Kemp testified as follows:

Q. Do you recall any discussions with Mr. Chenoweth about how many meat-hauls you had made?

A. No.

Q. You don't recall any?

A. No, I can't.

Q. Did you ever tell Jimmy Chenoweth in your life that you had a good—you had made so many meat-hauls—I am using the word "meat-hauls".

A. I can't recall.

Q. You won't deny it?

A. I wouldn't say I deny it, but——

Q. You know what a meat-haul is? What is a meat-haul, can you tell the court?

A. A meat-haul is when you take a party down to a prostitute.

Tr. Vol. II, p. 347.

Q. But you say that you may have told Jimmy—bragged to Jimmy Chenoweth about how many meat-hauls you made?

A. I don't believe I did, sir.

Q. You don't believe you did. Well, are you ready to testify now that you never told Jimmy Chenoweth how many meat-hauls you made?

A. No, I am not ready to testify either way on it. I don't even remember Jimmy Chenoweth very well.

Tr. Vol. II, p. 348.

Kemp was also impeached by T. H. Miller, the Chief of Police of the City of Anchorage, who testi-

fied that he had held that office for four years; that he had known of Robert Lee Kemp for about the same time; that he knew the general reputation of Kemp for truth and veracity, and that it was not good, and that he knew his general reputation as to moral character and that it was not good.

Tr. Vol. III, pp. 679, 680.

Kemp was further impeached by Lynn W. Kirkland, who testified that he was and had been since September 1952 an Assistant U. S. Attorney at Anchorage, Alaska. Tr. Vol. III, pp. 637, 638.

Kirkland testified that Robert Lee Kemp's reputation for moral character was bad. Tr. Vol. III, p. 641.

Kirkland testified as follows:

Q. Do you know of Robert Lee Kemp?

A. I do.

Q. Do you know Robert Lee Kemp's reputation for moral character?

A. I do.

Q. What is it?

A. I found it to be bad.

Tr. Vol. III, p. 641.

Q. Now you testified as to Mr. Kemp's reputation as being bad?

A. That is correct.

Q. And who have you talked to about Mr. Kemp's reputation?

A. Naturally being in law enforcement, why, some of the various parties. I couldn't name all of them. I believe Chief of Police of the Anchorage City Police Force, Mr. Miller has informed me that he was a pimp.

Tr. Vol. III, p. 642.

Q. Now, did you talk to Mr. Miller about Mr. Kemp's reputation or as to some specific trait or another?

A. I don't understand your question.

Q. I will repeat it. Did you talk to Mr. Miller about Mr. Kemp's reputation in general or did you talk about what he did or what specifically he did?

A. In general and specifically both.

Q. Well, were you talking about the subject of his reputation when you were talking with Chief Miller?

A. Yes.

Q. And you told Chief Miller, or Chief Miller told you that this man's reputation is bad, or words to that effect?

A. Words to that effect.

Mr. Fitzgerald. No questions.

A. And to further answer the question I can name various other people in law enforcement whom I have discussed this with also.

Tr. Vol. III, p. 643.

The testimony of Robert L. Kemp that he hired Stringer in the Federal jail to defend him on the criminal charge should be disregarded. It is conclusively established by his own testimony and that of James Lewis that after Stringer visited him in jail, he went to the Radio Cab office to consult Lewis about whom to hire in his defense. The trial Court conceded this in its opinion, as heretofore stated, citing both the evidence of Kemp and Lewis.

Lewis fully corroborated Kemp in this particular. Tr. Vol. III, pp. 576, 577, 578, 579, 580, 581, 591, 594, 595, 596, 604, 616, 617, 618.

Lewis testified that he had never been convicted of a crime. Tr. Vol. III, p. 591.

Referring to the conversation with Kemp in the Radio Cab office, before going to Stringer's office, Lewis testified as follows:

Cross-examination by Fitzgerald:

Q. Now, the first time you saw Kemp after his arrest was in your office on the following day, is that correct?

A. That is correct.

Q. And as I recall there was a discussion as to who he should go to as an attorney?

A. That is true, yes.

Q. And whom did you recommend?

A. I recommended the office of Stringer and Connolly.

Tr. Vol. III, p. 594.

Q. Would you recall everything that was said at that time?

A. It would be impossible.

Tr. Vol. III, p. 595.

Mr. Grigsby. Radio Cab office?

Mr. Fitzgerald. Yes.

A. It would be impossible to recall all that was said. It has been a couple of years.

Q. Well, it's been a couple of years——

A. The important thing was that he got—he came and wanted counsel, wanted an attorney.

Q. And you really aren't very clear what was discussed, are you?

A. I am quite clear of—in my mind it is quite clear that all he wanted was an attorney. That was the object of the conference, he wanted an attorney.

Q. I know that, but what I am saying is, and will you answer my question, you don't quite remember any——

A. I don't remember the details, no.

Q. I see. And you don't recall exactly what he did say to you?

A. Other than that he needed an attorney, no, I don't recall.

Tr. Vol. III, p. 596.

Herald E. Stringer, the defendant in the Court below, was the only witness for the defense as to what took place in the Federal jail between himself and Kemp before Kemp was released on bail.

Herald E. Stringer was admitted to the bar at Anchorage, Alaska, in November 1946, and has engaged in the active practice of law since May 1948 in Anchorage. At the time of the trial of the disciplinary proceedings instituted against him, June 17, 1954, he was a citizen of high standing in the community, being a member of the Anchorage Chamber of Commerce, the Veterans of Foreign Wars, American Legion, the Elks, the Masons, the Shrine, the House of Representatives of the Alaska Legislature, Chairman of one of the interim committees of the Legislature, counselor to the local Draft Board, and also Territorial Central Committeeman and Chairman of the Divisional Committee of the Republican Party in the Third Division of the Territory of Alaska. As is well known, the Republican and Democratic political organizations send voting delegates to the National Conventions.

Federal appointments in Alaska are a matter of political patronage and the recommendations of the party organizations are as a rule followed. This is true of the offices connected with the Department of Justice, the District Judges, U. S. Marshals, U. S. Attorneys and Assistants, and subordinate offices, as the Clerk of Court and United States Commissioner.

The District Judges are appointed for a term of four years and until their successors are appointed and qualified, unless sooner removed for cause. However, as a matter of comity between political parties, they generally tender their resignations upon change of national administration. As appears from the evidence on the trial of this case hereinafter cited, both Judge McCarrey, who presided at the trial, and U.S. Attorney William Plummer, who directed the conduct of the case, felt under political obligations to the defendant, Herald E. Stringer. James M. Fitzgerald, the Assistant U. S. Attorney who tried the case, was an exception to the general rule, was an appointee of the previous administration and under no political obligations to the defendant, Herald E. Stringer.

As is shown by the testimony in the case, the defendant, Herald E. Stringer, bore an excellent reputation in the community both as a citizen and lawyer, and among his fellow practitioners, as is further evidenced by the class of lawyers who rose to his defense, as counsel and as witnesses, many of whom are well known to this Appellate Court.

The information upon which this case was tried in the lower Court was based upon the deposition of Robert L. Kemp taken on the 22nd day of September 1953.

Kemp had been a taxi-driver in the employ of the Radio Cab Company for about a year and one-half prior to May 1952 and prior to that for other companies. Tr. Vol. I, p. 7.

Chief of Police Miller testified he knew Kemp as a taxi-driver for about four years.

In decided contrast to Stringer's high standing in the community, Kemp had a bad reputation for truth and veracity and moral character. He was familiar with the life of the underworld. He knew what meat-hauls were. He had boasted of the number of meat-hauls he had made. This he refused to deny. It is apparent from the testimony in the case on the subject of meat-hauls that they were a profitable branch of the taxicab drivers' business.

In his trial brief the U. S. Attorney made the following statement:

> "There is apparently in this case only one important key government witness. He is Robert Kemp, the client whom Mr. Stringer represented in the criminal violation involved. A thorough study and review of the case reveals that the entire government case is centered about this witness. . . ."
>
> Tr. Vol. IV, p. 947.

Kemp was denominated a pimp by Miller, Chief of Police.

On the strength of the testimony of Kemp, a proven disreputable character, and the "one important key government witness", the Court resolved all the material issues in favor of the government.

The Court ignored the testimony of defendant Stringer and his witnesses.

On October 4, 1954, the Court filed a written opinion in the case in which the following statements appear:

> "Although the witness Kemp was impeached in certain respects his testimony was not completely deprived of value. Especially is this true when the court must consider the evidence which is in the power of one side to produce and of the other to contradict . . ."
>
> Tr. Vol. I, pp. 121, 122.

> "The court was also concerned over the lack of inconsistencies between the defendant and his witnesses, since in most cases under like circumstances there are differences in testimony. This absence of inconsistencies and lack of spontaneity persuade me that the defense witnesses were exceedingly well rehearsed at pre-trial discussions and precludes me from giving their testimony too much weight . . ."
>
> Tr. Vol. I, p. 122.

> "While the law is clear that the attorney is in the same position as any other person negotiating a contract for employment initially, at which time he is dealing at 'arm's length', and the relationship is not then subject to the particular scrutiny

of the court (7 CJS Attorney and Client, Section 181 (a), pg. 1047) once the relationship of attorney-client has been entered into, as I find in this case it had been (supra) the attorney stands in a fiduciary relationship to the client and any alteration of that contract will be scrutinized very closely by the court in order to determine whether or not there has been a breach of the fiduciary relationship (7 CJS Attorney and Client, Section 127(a) pg. 964) . . ."

Tr. Vol. I, p. 129.

"Since it is my conclusion that the attorney-client relationship was established when the defendant called on Kemp in jail, the fact that the defendant denied the contract entered into for the sum of $500.00 at that time I consider unimportant, insofar as defendant's culpability is concerned. Whether this prior agreement for $500.00 was made or not, it is no less culpable for an attorney to take advantage of his client's necessities and inexperience to induce him to make a contract in advance to pay an exorbitant fee for services than it is to take advantage of those necessities and inexperience to exact an unreasonable fee after the services have been rendered. Defendant's forgiveness of $1,000 of the fee does not lessen the impropriety of his conduct. Rather, it illustrates that defendant himself felt the fee to be excessive . . ."

Tr. Vol. I, pp. 130, 131.

In the language of the Court in the first statement above quoted, "although the witness Kemp was impeached in certain respects his testimony was not

completely deprived of value," Kemp certainly was impeached in certain respects; that is, with respect to his reputation for truth and veracity and moral character.

As he was not corroborated by anyone as to any facts in dispute, this impeachment, by witnesses of the highest standing, deprives his testimony of any value on every disputed question.

In the second statement above quoted the Court expresses his concern over the lack of inconsistencies between the defendant and his witnesses and accuses the defense of pre-trial discussions and rehearsals, implying misconduct on the part of the defense counsel.

Not only this, the testimony of defendant and his witnesses did not agree as to details but only as to the ultimate fact; that is, that Stringer and Kemp entered into a contract in Stringer's office in their presence, in the presence of Stringer, Connolly, Kemp and Lewis, for the defense of Kemp on the criminal charge against him. They agree that the fee was a flat fee for the defense of the case and not contingent. Assuming they were telling the truth, they could not have failed to remember the ultimate fact. On this, as to details of the conversation, they either do not remember or differ.

Stringer's testimony is clear and convincing. He testified as follows:

> Q. All right, will you continue now to set the time and place and persons present with the conversation which occurred on that occasion, to the best of your recollection, Mr. Stringer?

A. Kemp came in the office accompanied by Mr. Lewis and told me that he wanted to hire me to represent him on his case. I asked him to relate the facts to me as he knew them. He did so and a general discussion then took place with reference to the circumstances of the case. We told Kemp that the crime with which he had been charged was a serious one. We discussed the nature of the penalties if he were convicted and I told him that I would defend him for $2,500.00.

Q. Was there any discussion then as to how the fee would be paid or how?

A. I told him it would be necessary for him to pay $500.00 down and the balance of it as soon as he could get it, in any event before we went to trial.

Tr. Vol. IV, pp. 769, 770.

Q. Now, do you recall anything further with regard to that particular conversation, this first occasion of the visit?

A. I believe that when I told Kemp that we would require $500.00 down on the $2,500.00 fee either he or Lewis paid me $100.00 at that time and said they would have the balance for me within the next few days.

Tr. Vol. IV, p. 771.

In his deposition taken by stipulation before the information was filed, Stringer testified as follows:

Q. What was the amount of that fee?

A. When Mr. Kemp came in our office and employed us, I went over the facts with him at that time, and when I had ascertained the type and

nature of the crime and knew the penalties involved upon conviction, I set a fee at that time.

Q. And what was the fee which you set?

A. $2,500.00.

Q. When you set the fee of $2,500.00, Mr. Stringer, did that include legal services which were to be rendered by you at the trial of the case against Mr. Kemp in case that became necessary?

A. That fee was for representing Robert Kemp—defending Robert Kemp—in this case, whether it went to trial or was disposed of otherwise.

Q. Then, for the $2,500.00, you expected to defend him to the bitter end, excluding possibly, appeals?

A. That is correct.

Deposition of Herald E. Stringer, pp. 3, 4, 5.

Connolly testified:

Q. And at the conclusion of that conversation was a fee agreed upon for the defense of the case?

A. Well, I don't believe it was at the conclusion, but during that conversation the fee was arrived at, yes.

Q. And what was the amount of the fee arrived at?

A. $2,500.00.

Tr. Vol. III, p. 484.

Q. And what part of that was to be paid in cash?

A. There was to be $500.00 paid in cash.

Q. And was any part of that $500.00 paid in cash?

A. Sometime during that day $100.00 was paid, yes.

Q. Now, was there, it might be a little leading, but do you remember anything being mentioned as to the possibility of a dismissal?

A. That was mentioned. When we went over the case with Mr. Kemp we advised him of the maximum penalty that could be imposed and minimum penalty that the statute provided for, the things that could happen during the process of the case and the fact that it was possible that a dismissal might be obtained was mentioned, yes.

Q. Now, did the possibility of dismissal enter into the terms of the fee to be charged?

A. No, sir, it did not.

Tr. Vol. III, pp. 484 to 485.

Q. But the fee of $2,500.00—was the fee of $2,500.00 understood between you to be for Mr. Stringer to handle the defense of the case from then on through every stage that might develop?

A. Through the District Court, yes. Whatever the outcome or whatever the circumstances demanded it was to be defended through the District Court.

Tr. Vol. III, p. 486.

Q. (by Mr. Fitzgerald). Mr. Connolly, you just stated that you expected, on your last meeting with Mr. Kemp when the question of dismissal was discussed with him saying that the case had been dismissed, "How about the rest of the fee", you just stated that you expected him to pay immediately, is that correct?

A. Yes, it was understood at the time that he came to our office that he would pay $500.00 imme-

diately and he gave us to understand the other $2,000.00 would be coming very shortly.

Q. And as I understand it now the fee was to be $500.00 in cash and $2,000.00 at the conclusion of the case?

A. No, that is not right. It was to be—the fee was $2,500.00. He was to pay $500.00 immediately and the $2,000.00 as soon as he could get it.

Tr. Vol. III, p. 497.

Lewis testified as follows:

Q. Now, after this discussion and after Mr. Kemp was informed of the possible penalty the case carried, and of the toughness of the case and all that Mr. Stringer told him, was a fee agreed upon?

A. Yes, there was.

Q. And what was the fee agreed upon?

A. $2,500.00.

Q. And now just tell me what was Mr. Stringer to do for that $2,500.00?

A. He was to defend the case.

Q. And was there any conditions with regard to that agreement of $2,500.00 made as to whether the case would be disposed of by dismissal, by trial or otherwise?

A. The fee of $2,500.00 was for defending the case. There were no conditions whatsoever.

Q. And it was a fee to defend the case in whatever way——

A. In any way, yes.

Q. And he mentioned the possibility of dismissal?

A. Yes.

Q. But did the possibility of dismissal in any way enter into the fixing of the fee?

A. I didn't hear that.

Q. Did the possibility of dismissal affect the fixing of the fee in any way?

A. No. No, definitely not.

Tr. Vol. III, pp. 579, 580.

Up to October 4, 1954, the date of the Court's opinion, the crucial question in the case was whether or not Stringer was employed by Kemp in the Federal jail to defend Kemp on a criminal charge for a fee of $500.00. To this question more testimony and argument was devoted than to any other question.

Finding of Fact II is that Stringer was so employed, although the contrary was proven beyond a reasonable doubt, as has been shown. Finding of Fact II is the basis of Conclusion of Law I, which is that this employment in the Federal jail established the fiduciary relationship of attorney and client which continued thereafter, and, as stated in Conclusion of Law II, placed the burden of proof on Stringer as to his fairness and good faith in setting his fee.

Finding of Fact II is also the basis of Conclusion of Law III to the effect that Stringer violated this fiduciary relationship by setting a fee of $2,500.00 after he had already been employed for $500.00 in the Federal jail.

Finding of Fact II is also the basis of Conclusions of Law IV and V, which are to the effect that the $2,550.00 which the defendant charged his client was grossly excessive because it bore no possible relation to the amount of work done by the defendant, the

benefits obtained for the client or the client's ability to pay.

None of these considerations had anything whatever to do with the contract made in Stringer's office as he did not fix his charge on the basis of the work done, but on the work the defense of the case might involve. There had been no work done when the fee of $2,500.00 was agreed upon in Stringer's office on May 8, 1952, which is undisputed.

Finding of Fact II is the basis of the whole case against Stringer.

As stated in the Court's opinion above quoted, because of the lack of inconsistencies and differences in the testimony of Stringer and his witnesses, the Court was "precluded from giving their testimony too much weight."

But as to the paramount question—the question of the contract made in the Federal jail—Stringer had no corroboration. He was his only witness. According to the Court's opinion, he would have been better off if he had had no corroboration at all, both as to the contract made in his office and as to every other phase of the case.

On the principal issue—the contract made in the Federal jail—the evidence of Kemp and Rollins had been completely demolished before Stringer took the stand.

Yet, because Lewis and Connolly corroborated Stringer as to the contract made in the office, the Court disregards Stringer's testimony as to the contract made in the jail.

The Court bases his decision on the all-important issue on the testimony of Kemp—the impeached witness, the self-confessed meat-hauler, the pimp—as against the testimony of Stringer, a man of high standing as a lawyer and citizen and with an unblemished record until this baseless proceeding was brought against him.

Conclusion of Law VI is that in securing Robert L. Kemp's agreement to pay a fee of $2,550.00, the defendant was guilty of unconscionably overreaching his client. "Overreaching" is defined in Webster as "to cheat." The Court has branded Herald E. Stringer, a practicing attorney, as a cheater of clients.

Finding of Fact VI.

Finding of Fact VI is to the effect that this overreaching of Robert L. Kemp was by taking advantage of Robert L. Kemp's fear, ignorance, etc.

The only testimony in this case to the effect that Robert L. Kemp was ever in fear was that of Arthur David Talbot. Tr. Vol. II, pp. 235, 236.

Kemp displayed no fear throughout the trial while on the witness stand. He was always self-possessed, cool and ready with his answers. Perhap the realization that he was a government witness restored his courage.

Kemp did not testify at any time that fear played any part in the making of the contract in Stringer's office. In fact, according to his own teestimony, his chief concern was the restoration of his chauffeur's license. Apparently when he went to Stringer's office,

he was under the impression that the offense charged was trivial; that it involved a violation of city ordinances, with which he was familiar. Thereupon he was informed that he was charged with a felony; he was informed of the possible penalties which could be imposed if he was convicted; he was informed of the possibility of indictment and conviction. He was told that his being a taxi-driver would handicap him on a trial. He was told nothing which it was not Stringer's duty to tell him and Stringer would have been derelict in his duty if he had not told him what he is condemned for telling him. Kemp and Stringer agree on the information given to Kemp at Stringer's office in this respect. Advantage was not taken of Kemp's ignorance, because he was not ignorant. He was what might be termed a "wise guy."

Finding of Fact VII.

Finding of Fact VII is in substance that James Lewis, part owner of the Radio Cab Company, acted for defendant Stringer in his, Lewis', dealings with Kemp.

The evidence is absolutely to the contrary and to the effect that Lewis acted at all times as Kemp's agent and not Stringer, or else in his own interest.

Kemp requested Lewis to go with him to Stringer's office. Tr. Vol. III, p. 578.

Lewis urged the Smiths to sign the notes. He felt that Stringer had done his job and that it would be an incentive to work on the chauffeur's license if Stringer's fee was secured.

He believed at that time that the Smiths were indebted to Kemp in the amount of $600.00 or $800.00 and used that as an argument why they should sign the note.

Tr. Vol. III, pp. 587, 588.

(NOTE: Mr. Smith testified that he owed Kemp $700.00 or $800.00 and that by signing one of the notes he would be putting himself out only $200.00.) Tr. Vol. II, p. 412.

Lewis further testified that he went to see attorney Peterson at Kemp's request. Tr. Vol. III, p. 602. That he went frequently to Stringer's office with respect to the Kemp case in order to get Stringer to hurry up and get the case over as fast as possible so Kemp could recover his chauffeur's license and get back to work. (This was both in the interest of Kemp and Lewis.)

Lewis and Kemp were kept informed as to the progress of the case. Tr. Vol. III, pp. 603, 604, 605. Lewis testified that he went with Kemp to Smith's house because Kemp wanted him to do so. He believed Kemp asked him to go down there because there seemed to be some doubt in Kemp's mind as to whether they would sign the notes and Kemp wanted him to help urge them to sign. Tr. Vol. III, pp. 611, 612.

Throughout all Kemp's testimony, he corroborates the testimony of Lewis to the effect that Lewis was Kemp's agent, not Stringer's.

This question is of great importance because if Lewis were Stringer's agent, as the Court found, the improper arguments made by Lewis to induce the Smiths to sign the note, if any such improper arguments were made, would be binding on Stringer and admissible—otherwise inadmissible as not being made in Stringer's presence.

That this Finding VII was not justified by the evidence has been demonstrated. It was prejudicial error.

In view of the evidence to the contrary, it is difficult to conceive on what theory Finding of Fact VII is justified, unless the Court suspected that Lewis was a runner for Stringer, that they were in cahoots to make money out of defending taxi-drivers for their mutual benefit. Some years before the trial Stringer had obtained a divorce for Lewis. Connolly had at one time been attorney for the Radio Cab Company and each of them had defended a taxi-driver possibly because of the recommendation of Lewis. They were not highly profitable cases.

However, the Court did suspect an unholy alliance between Lewis and Stringer. During argument on the motion for a summary judgment and before any witnesses had been called, the Court asked:

> . . . Now where does Mr. Lewis fit in it.
>
> Mr. Grigsby. He doesn't fit in anywhere with any such statement as this, which on its face can't be true. It is ridiculous.
>
> Tr. Vol. II, p. 175.

The Court. Mr. Grigsby, though, the thing that bothers the court is where does Mr. Lewis fit into the picture?

Mr. Grigsby. What is that?

The Court. Based upon the testimony of the affidavit of Kemp where does Mr. Lewis fit in it?

Tr. Vol. II, p. 180.

Mr. Grigsby. . . . Your Honor repeatedly asked me where does Mr. Lewis fit in.

The Court. That is right and I state that for this reason, that is, is Mr. Lewis by an stretch of imagination an agent of Mr. Stringer?

Mr. Grigsby. Well, Your Honor, Mr. Kemp was working for Mr. Lewis. Mr. Lewis was his employer at that time. If Your Honor will remember there were cases every day in the Commissioner's Court involving white slavery charges under the City Ordinances and all the taxi-cab proprietors were constantly in court on just such transactions. If Your Honor wants to examine Mr. Lewis you will find that at that very time he spent about half of his time in Police Court on charges involving these technical white slavery transportation cases.

The Court. Well, that is just my point now, was there any relationship between Lewis and Stringer because of that?

Mr. Grigsby. Why Mr. Stringer had been Mr. Lewis' attorney. He wasn't then, but he had been his attorney in several matters. Mr. Lewis recommended Mr. Stringer as an attorney to Mr. Kemp. Mr. Kemp is working for Mr. Lewis, and Mr. Kemp wants to know, "Who will I get to defend me", and he says, "Those fellows that got you out on bail are all right and I will take you

up to them". That is conceded by everybody, that Lewis took Kemp to Stringer as his employer and took him to Stringer because he thought, we will have Stringer—does a man have to have a relationship with an attorney to recommend him as an attorney? He had had satisfactory relations with him, which would lead him to make the recommendation.

Tr. Vol. II, pp. 188, 189.

During the examination of the first government witness, Talbot, the following occurred:

The Court. Mr. Talbot, did Mr. Kemp give you the impression or any information concerning the relationship between Mr. Lewis and Mr. Stringer, if any?

A. Well, only that Kemp said he knew that Mr. Stringer was Lewis' attorney and that he understood that they were pretty close friends.

The Court. Did he indicate in any way or any manner whatsoever that Mr. Stringer might be paying Mr. Lewis something for this—bringing these cases to him?

A. I think he investigated that question, but he never stated that he believed it or could prove it.

Tr. Vol. II, p. 240.

Mr. Kay. May I point out, Your Honor, I don't want to be positive at all about the case, but any testimony that Mr. Smith admittedly gives out of presence of Mr. Stringer would be hearsay entirely.

The Court. Yes, I know that, but there is something very unsavory in this case, I point out

to you, counsel, between Mr. Lewis and Mr. Stringer and the court can't put his hand on it.

Mr. Kay. I can't see anything unsavory.

The Court. That is the court's opinion.

Mr. Kay. In fact, it amazes me that the court's opinion, as a practicing attorney yourself, Your Honor, that you have——

The Court. You will have a chance to argue it, Mr. Kay. It is improper at this time.

Mr. Kay. I just want to comment on the use of the word "unsavory". I want the court to know I resent it.

The Court. Now, you may use that in your argument and the court would ask you to use your argument at the proper time.

Tr. Vol. II, pp. 403, 404.

"Is Mr. Lewis by any stretch of the imagination an agent of Mr. Stringer." There being no evidence to support Finding of Fact II, it must have been based on a "stretch of the imagination."

"Was Stringer paying Lewis something for bringing these cases to him."

"There is something very unsavory in this case between Mr. Lewis and Mr. Stringer and the court can't put his hand on it."

It is apparent that Finding of Fact VII, that Lewis was Stringer's agent, was based upon suspicion and conjecture. The attitude of the Court indicates a disposition to ferret out something to Stringer's detriment.

There is something "unsavory" about Finding of Fact VII.

Finding of Fact VIII.

There is no possible basis for Finding of Fact VIII in which Stringer is charged with having failed to advise his client concerning the status, merits and probable outcome of his client's case. On the contrary, the uncontradicted evidence in the case shows that Kemp himself and Lewis, acting for him, visited Stringer's office frequently for the purpose of being informed on the status of the case, both knowing that Stringer was endeavoring to get the case dismissed and both being anxious that it be dismissed in order that Kemp could recover his chauffeur's license and get back to work.

That Stringer was not motivated by the desire for personal gain in the form of fees, as found by the Court in its opinion, Tr. Vol. I, p. 126, is evidenced by the fact that Stringer obtained a note for $1,000.00 guaranteed by responsible people on June 18, 1952, payable in monthly installments of $100.00 each, bearing interest, first payment due August 1, 1952, then promptly forgot all about it for more than a year.

Sometime in July 1953, in going over his accounts receivable, he discovered this note, all of which was past due. He then sent for Kemp and obtained an agreement from him to pay $75.00 per week.

Pursuant to this agreement, Kemp made payments aggregating a total of $215.00 between July 29 and August 27, 1953, inclusive. At the time of making one of these payments, Kemp proposed that Stringer accept an automobile on which there was an indebtedness

as payment in full of the balance due on the note. He did not dispute his indebtedness to Stringer. The offer was refused by Stringer. On that occasion Kemp asked Stringer to reduce his fee, whereupon Stringer consented that upon payment of the $1,000.00 note, co-signed by the Smiths, that he would forgive the other. Tr. Vol. IV, pp. 798, 799 and 844.

Following this, Kemp made no further payments, but sought legal advice claiming to the attorneys consulted that Stringer had not obtained the recovery of his chauffeur's license and that obtaining this recovery was a part of the original agreement, and, in effect, that the consideration for the unpaid note had not been fully paid. He gave no other reason to the attorneys consulted, either according to his own or their testimony, than lack of consideration.

Having obtained the concessions above detailed, everything he asked for, Kemp then decided not to make further payments, and, as heretofore stated, retained Roger Cremo to defend a possible civil suit. then fell into the hands of Talbot, who, if he had used good judgment, would have awaited the outcome of the trial of the civil suit before deciding to ruin Stringer.

2.

ARGUMENT ON MISCONDUCT OF THE COURT.

On February 2, 1954, Judge J. L. McCarrey Jr., before whom this proceeding was tried in the District Court, caused to be filed the following order:

ORDER

Whereas, the undersigned U. S. District Judge for the Third Division, presiding in Anchorage, Alaska, has disqualified himself to hear the above entitled matter, as set forth in 54-2-1 of the 1949 Compiled Laws of the Territory of Alaska;

It is hereby ordered that the above entitled file be sent to the Honorable Harry E. Pratt, U. S. District Judge for the Fourth Division of the Territory of Alaska, presiding at Fairbanks, Alaska, for his consideration and further determination.

Done in Open Court this 2nd day of February, 1954.

J. L. McCarrey, Jr., /s/
District Judge.

Tr. Vol. I, p. 57-A.

Judge McCarrey had not, as stated in the foregoing Order, disqualified himself under the provisions of Sec. 54-2-1 Alaska Compiled Laws Annotated 1949.

The only provision contained in this section under which a judge could be disqualified is Paragraph Fifth of this section, which is as follows:

> "Fifth. Whenever any party, or any attorney for any party, to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or his attorney or in favor of any opposite party, or attorney for an opposite party, to the suit, and that it is made in good faith and not for the purpose of delay. Every such affidavit shall state the facts and the

reasons for the belief that such bias or prejudice exists, and shall be filed within one day after such action, suit, or proceeding is at issue upon a question of fact, or good cause shall be shown for the failure to file it within such time. No party or attorney shall be entitled to file more than one such affidavit in any case. The provisions of this subdivision shall apply only to the District Court."

No affidavit of prejudice was ever filed nor was any objection ever made by appellant or his attorneys to the case being tried before Judge McCarrey.

The only grounds of disqualification which Judge McCarrey could have invoked are those set forth in Sec. 455 of New Title 28 U. S. Code, as follows:

"Sec. 455. Interest of Justice or Judge. Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related or connected with any party or his attorney as to render it improper in his opinion for him to sit on the trial, appeal or other proceeding therein."

By Sec. 460 New Title 28 U. S. Code, Sec. 455 is made to apply to the District Court for the Territory of Alaska.

As will be seen from reading Sec. 455, no litigant could invoke this section for the reason that the grounds stated why a judge should disqualify himself depend altogether on his own opinion and not in the least on the opinion of a litigant or his attorney.

Judge McCarrey was of the opinion that he was so connected with the defendant Stringer as to render it improper for him to sit on the trial, as he repeatedly stated in and out of Court. In an opinion filed March 5, 1954, Judge McCarrey stated, among other things, as follows:

> ". . . counsel have repeatedly expressed the opinion that this court is qualified to hear the case, even though this court has repeatedly expressed his opinion that he should disqualify himself because of political affiliations of the court and Mr. Stringer as well as personal acquaintanceship with him as a practicing attorney here in the City of Anchorage over a considerable period of time."
>
> Tr. Vol. I, p. 61.

In the same opinion the Court states as follows:

> "As is evidenced from the file, this case, along with another similar case, was referred to the Honorable Harry E. Pratt, District Judge at Fairbanks, Alaska, with the understanding that Judge Folta would go to Fairbanks and try cases while Judge Pratt came to Anchorage to hear this matter. However, it is to be noted that on the 4th day of February, 1954, Judge Pratt transferred the case back to this division for '. . . good cause appearing for the same . . .'
>
> "If the District Attorney or counsel for Mr. Stringer desire to file an affidavit of disqualification of this court within three days after the entrance of this opinion, the Honorable George W. Folta has agreed to hear the matter, as he does not feel that he is disqualified to hear the matter, nor are there any grounds surrounding this case

in which he should in all fairness to the government as well as to Mr. Stringer, disqualify himself.

"The tenure of this implication, and the threat, has been unfortunate, not attributable to any one person, but to a set of circumstances, and must not be permitted to stand longer.

"I, therefore, feel it is my duty to set this matter down for hearing upon the merits at an early date."

Tr. Vol. I, p. 62.

The argument on the motion referred to in the above quoted matter took place on February 18, 1954. During the argument the Court stated as follows:

"Thank you, Mr. Plummer. I think the Court should probably reply to Mr. Plummer's reference to the order and that is the fact that on the second day of February the court did refer the matter to Judge Pratt at Fairbanks, Alaska. Now, the court advised Mr. Grigsby and also Mr. Stringer and I think one or two more attorneys that he, himself, would have to disqualify himself and that has been the position the court took. . . . The court would like to hear counsel, but the court is advising all counsel at this time that for reasons which the court feels are presently personal in nature, due to the past relationship between myself and Mr. Stringer, being members of the same political faith, and Mr. Stringer, of course, recommended me to this bench I feel I could not be fair, probably, to the public in hearing the case which made Mr. Stringer prove that he was innocent—the converse should be the case.

As Mr. Plummer pointed out this is not strictly a criminal nor strictly a civil proceeding and it is a special proceeding as this court interprets it, so, therefore, the court makes that statement to all counsel that under those circumstances feels he was disqualified and states that is the position the court took—the position that it was a preliminary matter and based upon being a preliminary matter that he had a right to hear counsel on that point. Now, if I am in error the court would like to hear any counsel or the district attorneys office in that respect. Well, the court felt that he was doing a favor to Mr. Stringer in disqualifying himself because the court may have intended to make him prove his innocence, whereas it should be the converse. That is why the court acted in that respect."

Tr. Vol. I, pp. 152, 153.

In the very opinion in which Judge McCarrey recited his disqualifications to hear the Stringer case, he ordered the matter set for hearing before himself at an early date unless an affidavit of disqualification was filed within three days after the filing of the opinion. No affidavit of disqualification was filed nor could any truthful affidavit have been filed because Judge McCarrey was not disqualified under the sections of the Alaska code set out above, and it was not for the defendant to invoke Sec. 455, New Title 28 U. S. Code. No one could invoke this section except Judge McCarrey himself, and it was misconduct on his part to fail to invoke this section when he knew he came within its terms, and for him to preside at the trial of the Stringer case.

It is difficult to fathom what Judge McCarrey meant when he made the statement above quoted, that

> ". . . I feel I could not be fair, probably, to the public in hearing the case which made Mr. Stringer prove that he was innocent—the converse should be the case. . . ."

Judge McCarrey owed no duty in the case except to try it fairly and impartially between the parties. It is true, as he stated above, that the Court had frequently advised Mr. Stringer and several of his attorneys, including Mr. Grigsby, that he would have to disqualify himself because of his political obligations to Stringer. He stated in substance that if he tried the case and vindicated Stringer, he would be subjected to public criticism for having paid a political debt, unless Stringer proved his innocence. It was perfectly apparent that Judge McCarrey felt that he would be tried in the forum of public opinion and that his chief concern was his own vindication. That Judge McCarrey did consider himself on trial is apparent from his statement during the trial, as follows:

> "The Court. . . . I feel I am trying to do the fair thing by counsel, after all, the court feels, in part, he has been tried, not the defendant in this case and that isn't proper because this court is not the one that is going to have judgment. It is Mr. Stringer, and I feel that counsel have a right to be overzealous, after all, he is a brother attorney and also a brother attorney of the court, and I feel that you should do all you can to protect your client because that is why he is in the courtroom, for that protection. On the other hand, I

do expect and I think I am entitled to a certain amount of decorum in the courtroom. That gives the court reporter the courtesy of getting the record down, so you may take exceptions to the court's ruling. Supposing you find that you want to appeal this? I feel, out of best interest of your client, that you shouldn't try the court, you ought to try the case that is before the bench and not the court itself."

Tr. Vol. III, p. 676.

There were other defendants in the case besides the Court and Stringer.

The United States Attorney's office was accused of whitewashing the case. Tr. Vol. II, pp. 340, 341. Assistant United States Attorney Fitzgerald considered the office on trial and asked for an opportunity to defend the accusation.

The Court considered the United States Attorney's office on trial and granted an opportunity to the office to defend itself against the charge of attempting to whitewash the case.

At the same time he asserted he did not use the word "whitewash" and stated "You will have the right, Mr. Fitzgerald, to argue the case and to defend yourself in respect thereto." Tr. Vol. II, pp. 416-d, 416-e.

Previously that very morning, Mr. Fitzgerald had used the word "whitewash" and the Court had adopted his language as follows:

"Mr. Fitzgerald. . . . We had the newspapers here this morning . . . that when the court indi-

> cated that we had misrepresented to the court the case that it put us in the light of having, in effect, whitewashed Mr. Stringer, which is not the case.
>
> "The Court. Well, I will tell you frankly at this time I am inclined to believe that you have given the court that impression. . . . I don't care to argue with you. The point is, you asked the court for an answer and I have given it to you."
>
> Tr. Vol. II, p. 340.

Former United States Attorney Buckalew and his assistant, Talbot, were tried for hours for various derelictions. Buckalew was acquitted of accepting a bribe, although never having been accused thereof. Court's Opinion, Finding 4, Tr. Vol. I, p. 126. His acquittal did not amount to a vindication. May it be stated right here that in the writer's 53 years of law practice in Alaska he has never even heard of an accusation of venality against any Federal judge or United States Attorney. Buckalew was not so accused except by insinuation and innuendo and to intimate that such a charge had not been proven against him was a blemish on his reputation rather than a vindication.

Talbot left the Court with a threat of a perjury prosecution hanging over him; was actually tried for contempt of court in committing perjury. This Appellate Court is familiar with those proceedings.

Insinuations of misconduct equivalent to accusations can be made in the form of questions. This device is sometimes resorted to by prosecuting attorneys on fishing expeditions in the hope of discovering something to bolster up a desperate case.

On the motion for summary judgment, with which the United States Attorney's office concurred, Mr. Fitzgerald submitted the affidavit of Robert Lee Kemp dated June 11, 1954. Tr. Vol. I, pp. 98-102. In this affidavit, Kemp made the following statement:

> "At no time did Mr. Stringer either expressly or impliedly give me the impression that he would resort to any improper method of keeping this case out of court. Mr. Stringer neither suggested nor implied that he would 'fix' the case. I had the impression that Mr. Stringer might be able to 'fix' the case but I obtained that impression from Mr. Lewis."
>
> Tr. Vol. I, p. 100.

While Mr. Kemp was on the stand, this affidavit was shown to him and he identified his signature affixed thereto. The Court questioned him as follows:

> The Court. Now, did you read that affidavit before you signed it?
>
> A. Yes, sir.
>
> The Court. And did you sign that freely and voluntarily?
>
> A. Yes, sir.
>
> The Court. You weren't coerced or placed under duress to sign that?
>
> A. No, sir.
>
> The Court. Very well.
>
> Tr. Vol. II, p. 303.

These questions by the Court were a veiled accusation against Mr. Fitzgerald of having used coercion and duress in obtaining the affidavit. They were a reflection on Mr. Fitzgerald's integrity. Such conduct

might be excusable in a prosecuting attorney under the circumstances above mentioned, but for the presiding judge, presumably trying the case fairly and impartially, this strained effort to discover something detrimental to the defense was highly reprehensible.

Judge McCarrey made inconsistent and contradictory statements in connection with the whitewash accusation to an extent that is bewildering.

First, he made the "whitewash" accusation as heretofore detailed and informed Fitzgerald that he could argue his position at the end of the case. Tr. Vol. II, pp. 340, 341.

Second, later on the same day Fitzgerald asked for an opportunity to defend the charges and was informed that he would have the right to argue the case and defend himself. Tr. Vol. II, pp. 416-d, 416-e.

Third, at the next session of the Court the defense called Mr. Fitzgerald and Mr. Plummer for the purpose of showing that there was no "white-wash" and the reason Fitzgerald was conducting the prosecution. Tr. Vol. III, pp. 442-451.

Apparently the Court was incensed at their testimony. He stated as follows:

> The court is not trying the District Attorney nor the Assistant District Attorney.
>
> Tr. Vol. III, p. 449.

At the last previous session of the Court, Fitzgerald had asked to be permitted to defend the United States Attorney's office. The Court had informed him he

could do so in his closing argument. The Court also stated:

> There is no implication, as far as this Court is concerned, that there was any political claim concerning the District Attorney's office in any way, shape or form. . . . We don't want to befog the issues of this case and I don't think the counsel for the defense have acted properly with respect thereto.
>
> Tr. Vol. III, p. 451.

Both Mr. Plummer and Mr. Fitzgerald had just testified that Fitzgerald had been assigned the conduct of this case because he was under no political obligations to Stringer. There is no other possible inference to be drawn from their testimony.

The issues in the case were not being "befogged." The question of whether or not the United States Attorney's office was "white-washing" the case was an issue on the motion for summary judgment which had not yet been ruled upon and on which testimony was then being received.

It is perfectly evident that the Court was unwilling that this issue be determined by evidence. He was provoked that it was cleared up by testimony and rebuked counsel for the defense.

Later on the same day that Fitzgerald and Plummer testified, the Court stated:

> I don't want to becloud the issues of this case. The District Attorney's office is not on trial in any way, shape or form.
>
> Tr. Vol. III, p. 633.

At the conclusion of the trial the Court made a complete "about-face". He granted the motion of Mr. Groh, Assistant U. S. Attorney, who took part in the trial, "that the testimony of Mr. Fitzgerald and Mr. Plummer which, in part, explains our handling of the case, be made a part of the government's case." Tr. Vol. IV, p. 933.

The Court permitted the government to adopt the testimony which he rebuked defense counsel for introducing.

At the same time the Court acquitted the U. S. Attorney's office of misconduct. Tr. Vol. IV, pp. 933, 934.

3.

FURTHER ARGUMENT ON MISCONDUCT OF THE COURT.

Error is assigned on the misconduct of the Court, in that

1. The trial judge assumed to act both as judge and prosecutor in his conduct of the trial, as appears from the transcript of proceedings on trial.

2. The trial judge exhibited bias and prejudice against the defendant throughout the trial of the case, as appears from the transcript of proceedings on trial.

Early in the trial Judge McCarrey announced his intention to take over both the prosecution and defense of the case, interrupting the direct examination of Kemp to do so, as follows:

> I am advising all counsel at this time to take this matter very seriously, and to prosecute and defend it to the utmost of your ability. If you don't do so, the court will have to do it to the best of his ability based upon the evidence.
>
> Tr. Vol. II, p. 284.

Shortly thereafter the court accused the U. S. Attorney of "white-washing", as has been shown, but never accused the defense of any laxity. On the contrary he commended the conduct of the defense, stating that counsel for defense had a right to be overzealous because Stringer was a brother attorney. Tr. Vol. III, p. 676.

When the direct examination of Kemp, on whose testimony the government's case wholly depended, was concluded, Judge McCarrey examined him at length, before permitting the defense to cross-examine. Tr. Vol. II, pp. 304-310.

He ruined the opportunity of the defense for effective cross-examination and conceivably this was his purpose, as he had previously threatened to take over the prosecution as has been shown. At least his course enabled him to fortify Kemp against effective cross-examination.

How far can a presiding judge go in interfering with the examination of witnesses?

Besides taking over the examination of Kemp before permitting defense counsel to cross-examine, the trial judge, in instances too numerous to mention for

lack of space, interrupted the examination of witnesses with a long series of questions.

Even the defendant, Stringer, was subjected to a lengthy cross-examination by the trial judge, after both the defense and the government had concluded. Tr. Vol. IV, pp. 838-849.

After Kemp's testimony had been concluded and the government had rested, later on the same day the trial judge recalled Kemp and examined him for fourteen pages of the record. Tr. Vol. II, pp. 341-345.

Following this, Kemp was instructed to remain at hand in case the Court wanted to call him back. Tr. Vol. II, p. 348.

This gave the judge an opportunity to interview Kemp during the recesses of the Court.

Since he had assumed the right to act as prosecutor, it was consistent with that assumption that he interview all his witnesses, during recesses, in chambers or anywhere else. If he had the right to act as prosecutor, he had all the rights and duties of a prosecutor.

Canon 15 of the Canons of Judicial Ethics condemns "undue interference, impatience, or participation in the examination of witnesses."

The trial judge violated Canon 15. He continually interfered and interrupted, which, under the circumstances, was inexcusable. The government was represented by able and conscientious counsel. Had they been anywise derelict in their duty, there might have been some excuse for the undue interference of the Court.

Early in the trial he had accused the district attorney's office of "white-washing" the case.

The defense called Mr. Plummer and Mr. Fitzgerald to disprove this accusation.

Near the close of the trial Assistant U. S. Attorney Groh moved to make their testimony a part of the goverment's case and offered to produce further evidence to disprove the accusation. The Court granted the motion and further stated that he "feels that the district attorney's office has vigorously prosecuted the case and feels that no additional testimony need be taken."

Under the circumstances there was no legitimate excuse for the trial judge taking over the prosecution of the case.

A trial judge cannot act as judge and prosecutor at the same time without getting on one side or the other. It is sometimes done in Police Court, but never in courts of record.

Judge McCarrey assumed this double role, and took the government's side. However, it is evident from the record of the trial that he was hostile to the defendant from the beginning of the trial to the end. As he stated, he felt himself to be on trial. Not by the defense, however, as he intimated, but by the "public", meaning in his conception of this term, public opinion, and public opinion meaning the opinion of the immediate public, including the spectators. This assertion would not be ventured if not supported by the record.

On June 23, 1954, the following proceedings were had. Tr. Vol. III, pp. 420-430.

Mr. Fitzgerald. This morning Mr. Talbot came to me and informed me that he had conferred with Your Honor that he was requesting to take the witness stand and told me that he felt that I would accommodate him. Mr. Talbot is here now and he would like to take the witness stand.

Tr. Vol. III, p. 420.

* * * * * * *

Mr. Fitzgerald. May counsel approach the bench?

The Court. Yes, you may.

(Thereupon, counsel for the Government and counsel for the defendant approached the bench and discussion was had without the reporter.)

Tr. Vol. III, p. 422.

* * * * * * *

The Court. I want you to make that from your table so everybody hears that.

Tr. Vol. III, p. 425.

* * * * * * *

The Court. Well, that is a position of the court. I will tell you my position from the court so everybody can hear.

Tr. Vol. III, p. 426.

* * * * * * *

The Court. Well, then again, I agree with counsel. I feel that there would be a gouge in counsel's testimony in this trial and on the contrary the court wants everything to come out so everybody can hear, excepting for the more or less mundane matters before the court.

Tr. Vol. III, pp. 428, 429.

In the course of the foregoing proceedings all counsel and the judge were at the bench several times, also the court reporter except at one conference. There was no one out of hearing except the bailiff and the spectators, including newspaper reporters.

By "everybody" Judge McCarrey must have meant the audience.

Hostility to Stringer.

While the defendant was testifying in his own behalf, the following occurred:

> Mr. Kay. * * * I was going to ask him directly what elements he considered in setting the fee * * *
>
> The Court. If Mr. Stringer, above everybody, at this time realizes he is under oath——
>
> Mr. Kay. Certainly.
>
> The Court. Then judge himself, accordingly.
>
> A. I understand I am under oath, your Honor.
>
> Tr. Vol. I, p. 77.

Stringer had been sworn and knew he was under oath. The Court knew that Stringer knew he was under oath. In effect, Judge McCarrey said, "You can answer the question, but remember you are under oath." The Court's admonition served to impugn Stringer's veracity and to insinuate to the audience that perjury could be expected. It was a direct insult to the defendant.

No other witness was singled out to be warned that he was under oath. Talbot, avowedly taking the stand

to correct his previous testimony, was warned of and took the consequences.

Hostility and unfairness to Stringer is revealed in the following statement of the Court in its opinion:

> Since Kemp apprised defendant that he did not have any money, defendant agreed to take a promissory note for $2000. Defendant claimed that this sum of $2000 was then due and owing although there was no testimony that there had been more than $200 paid at that time on the alleged $2500 attorney fee, $100 by Pat Rollins for Kemp and $100 by James Lewis for Kemp, supra. The $500 difference between that which was paid down and the promissory note which he wished to extract from Kemp was never explained.
>
> Tr. Vol. I, pp. 116, 117.

The above statement is absolutely contrary to fact in every respect and had been contradicted by the testimony of Stringer, in response to a question put by Judge McCarrey himself, as follows:

> The Court. May I interrupt you. No more payments were made until after the case was dismissed?
>
> A. No, sir, that is not a fact. He made two or three payments during the early part of June, as I recall.
>
> Q. Well, were these payments large or small?
>
> A. I believe one of them was $100.00 and the other one was a $50.00 payment and the third one was $200.00, all of which the entire $450.00 or $500.00, whichever it was that he paid me. I

am a little surprised at myself for not collecting the other $50.00, but he paid that amount in from May 8 up until June 17 or 18, along in there.

Tr. Vol. IV, p. 813.

Judge McCarrey took over the examination of Stringer for eleven pages of the record, Tr. Vol. IV, pp. 838-848, and examined him in detail on the very matter which his opinion states was unexplained.

It was fully explained in response to the questions of Judge McCarrey himself. Tr. Vol. IV, pp. 841, 842. It was explained as follows:

Q. Mr. Stringer, the court would like to see your records for the amount of money paid by Mr. Kemp prior to June 17, 1952.

A. May I have—just a minute, I may have that in my pocket. I had my secretary go through the receipt book that we were using at that time, Your Honor, and the receipt book shows that on May 8 there was $100.00——

The Court. Just a moment, please. Let me put these down. And you have that receipt book available, do you?

A. I assume so. I had her examine it and make a memorandum for me. May 8, $100.00; June 13, $100.00; June 14, $50.00 and June 18, $200.00, making a total of $450.00.

Q. Let's see, that was May 8, $100.00; June 13, $100.00; June 14, $50.00 and June 18, $200.00?

A. Yes, sir.

Q. Now, does your receipt book reflect $100.00 on or about the 7th day of May?

A. 8th day of May, yes, sir.

Tr. Vol. IV, p. 842.

It is perfectly clear from the testimony cited and quoted that the notes were made out on June 17, 1952, for $2,000.00 on the assumption by Stringer that the balance of the $500.00 was immediately forthcoming, and that it would be paid simultaneously with the delivery of the signed notes, which it was, but that it was not entered in the books until June 18.

Being in doubt about $50.00 of the amount already paid, Stringer gave Kemp the best of it to that extent and had the notes made out for $2,000.00.

When Judge McCarrey wrote his opinion, he seems to have been unable to recall Stringer's explanation, elicited by himself, being too much engrossed with his endeavor to find something in the record on which to base a decision against Stringer. In fact, nowhere in the record did Judge McCarrey discover anything favorable to Stringer whose own testimony he disregarded as probably perjury. Judge McCarrey would not permit Stringer to produce his receipts. Tr. Vol. IV, pp. 941, 942, as appears from the following:

> The court is disappointed in two respects. That is, that the defense has not explained by evidence or by argument the case of Glenn Hathaway as to the fee or anything connected therewith, and, furthermore, that the defendant has not seen fit to supply the receipts for which the court asked. That has not been done by way of evidence or by way of argument. Now the court wants——
>
> Mr. Stringer. Your Honor, that is being done at this time.
>
> The Court. Too late, counselor.
>
> Mr. Stringer. Are you going to rule on it this morning?

The Court. No.

Mr. Stringer. Then I will have those receipts for you before you write your opinion. I haven't had an opportunity to see my secretary since yesterday when I was on the stand, but I saw her long enough to tell her to get those together and make those available to the court as you had requested me to do.

The Court. Counselor, I point out to you, you have practiced law. You know that after a case has once rested that is it. Now, even by way of argument or by way of evidence there has been no explanation of those two points and so at this time I feel that it is not proper for you to offer those and I will not consider them for that reason. They are not timely offered, not properly offered, although the court asked you to yesterday.

Such deliberate unfairness is unprecedented. Countless times have cases been considered reopened for the admission of an overlooked exhibit. Kemp was at hand and was not called to deny Stringer's testimony. In fact, he had the original receipts.

In this brief much space has been devoted to the misconduct of the Court and it will no doubt be noticed by this Appellate Court that defense counsel made no objections *during the trial* to Judge McCarrey presiding at the trial when clearly disqualified by Sections 455 and 460 of New Title 28, U. S. Code; to his usurping the functions of the prosecuting attorney, his Interference in Conduct of Trial, in violation of the Canons of Judicial Ethics.

It is true that counsel for defense did not object, but submitted to the Court's misconduct.

It is true, as the record shows, that the trial judge informed defense counsel, in court and privately that he felt disqualified, that he would require Stringer to prove his innocence. Counsel for defense felt that they would be able to meet every test, and believe now that Stringer did prove his innocence.

Judge McCarrey made it plain to counsel that he feared that vindication of Stringer would be regarded by the "public" as the payment of a political obligation, as a "white-wash" of the case. Counsel for the defense had at that time more confidence in Judge McCarrey than he had in himself. They believed that once he embarked on the trial of the case he would be fair and impartial. They believed he would awaken to the realization that all considerations must be disregarded except the merits of the case. Counsel labored under this delusion throughout the trial and even until the decision was rendered, otherwise counsel would not be now attempting to excuse their apparent submission to the continual misconduct of the Court. They believed that while Judge McCarrey might not be able to rise to that degree of judicial perfection achieved by a few judges, which renders them unconscious of public opinion, he might at least have that degree of courage that would enable him to disregard it for the purposes of the trial, and feel that the approval of his own conscience, his sense of the rectitude of his actions, would surmount any

consideration of temporary public opinion. Counsel for the defense were sadly disillusioned. The record indicates that the judge never for a moment forgot public opinion, as represented by the spectators; that he was "playing to the galleries." As before mentioned, he had stated, "The court feels, in part, he has been tried, not the defendant in this case." That was true. The Court did feel that he was being tried; that every eye was upon him to see whether he was going to white-wash the case; that he was the real defendant, not Stringer.

As said before, he was not the only defendant. The present U. S. Attorney's office was accused of "white-washing" the case, tried, and acquitted. It is sometimes unsafe to take in too much territory.

Buckalew, former U. S. Attorney, was acquitted of taking a bribe, of which he had never been accused, Tr. Vol. I, p. 126, leaving him with a stigma on his reputation. Talbot emerged with a threat of a perjury prosecution. Everyone connected with the defense was blackened. The testimony of the defense witnesses was discredited because the judge was persuaded that they "were exceedingly well rehearsed at pre-trial discussions", an accusation of improper conduct both by defense counsel and witnesses. Tr. Vol. I, p. 122.

The judge denominated the array of able lawyers who testified for Stringer a parade. Tr. Vol. I, p. 122. They testified that the fee charged by Stringer was reasonable, or not high enough. There were no witnesses to the contrary.

After disposing of the U. S. Attorney's office, of Buckalew, and Talbot, there were no defendants left except the judge, a self-denominated defendant, and Stringer.

The judge seemed to feel that an acquittal of Stringer would be a conviction of himself.

Self-preservation is the first law of nature.

Judge McCarrey violated Canon 34 of the Canons of Judicial Ethics, entitled A Summary of Judicial Obligation, in that he was not "just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private, political or partisan influences."

Whether he was just and impartial may be safely left to the record of the trial. That he at all times was fearful of public clamor and regardful of public praise is evidenced not only by the record of the trial, but by his open avowal, frequently expressed, that he could not be fair to Stringer, would have to compel him to prove his innocence, because of his political obligation to Stringer, that otherwise he would be accused of paying a political obligation.

Judge McCarrey not only was in his own opinion disqualified to try the Stringer case, and violated the plain provisions of Sec. 455 of New Title 28, U. S. Code when he did so, but as is apparent from the record, Judge McCarrey prejudged the case. He had made up his mind when he went on the bench to try the case that Herald E. Stringer must be sacrificed on the altar of public opinion.

This is evident because before a witness had been called, while the motion for summary judgment was being argued, Judge McCarrey said, "Is Mr. Lewis by any stretch of the imagination an agent for Stringer?" "Was Mr. Stringer paying Lewis something for bringing these cases to him?" "There is something unsavory about this case between Mr. Lewis and Mr. Stringer and the court can't put his hand on it."

Vicious and preposterous as were these utterances, the lay public at once knew that the decision against Stringer was foreordained. Everybody knew it except defense counsel, who still had faith.

4.

THE LAW OF THE CASE.

Section 55-11-51 ACLA 1949 provides:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties."

An almost identical section is found in the Revised Codes of Montana, 1921, Sec. 8993, and again in Sec. 9786.

The Supreme Court of Montana in 1934 discussed these sections, and quoting from *Coleman v. Sisson,* 230 P. 582, states:

> "The purpose of sections 8993 and 9786 adverted to was to place the lawyer upon the same footing

> as other persons, free to make his engagements with his clients as they should agree: or, in other words, to give them the same freedom to contract as is enjoyed by others of the business world." In re Maury, 34 P. (2d) 380.

Section 55-11-51 ACLA 1949 was taken from the laws of Oregon. The identical provision is in Compiled Laws of Alaska, 1933, 1913, and in Carter's Annotated Alaska Codes.

> "Prior to assuming the relation of attorney and client a lawyer may bargain for his services with one proposing to employ him and may deal with him at arm's length."
>
> *Boldt v. Baker,* 13 Ohio App. 125.

The trial Court recognized this principle in its opinion. Tr. Vol. I, p. 129.

A case on all-fours with the Stringer case was decided by the Supreme Court of Oregon in 1924. *Barber v. Jetmore,* 227 P. 523.

In that case Jetmore contracted to defend Barber, charged with assault with intent to kill, for a fee of $5,000.00. The defendant was charged in the justice court. Kemp was charged in Commissioner's Court, a justice court.

In the Oregon case the contract provided for defending the accused at the trial and through the Supreme Court, if necessary. Stringer contracted to defend Kemp through the District Court.

In the Oregon case the contract provided for the defense of the accused throughout all proceedings,

including appeal to the Supreme Court. Stringer agreed to defend Kemp throughout all proceedings, including the trial in the District Court.

Both contracts were made shortly after the arrest of the defendant, and before any proceeding was had other than the filing of the complaint in the magistrate's court.

The authorities uniformly hold that the present value of the dollar is always to be considered, in relation to the amount of judgment recovered, as compared with its value years ago. The Stringer-Kemp contract was made in May 1952. The Jetmore-Barber contract was made in April 1920. In 1920, the purchasing power of the dollar in Oregon was four times its purchasing power in 1952. A fee of $5,000.00 was equivalent to $20,000.00 in the money of 1952, at least in Anchorage, Alaska.

Stringer charged $2,500.00 to defend his client through the District Court. Jetmore charged eight times as much to defend his client through the Supreme Court.

Jetmore took part of his fee in cash, the balance in an endorsed note. So did Stringer. On account of the financial circumstances of his client, Jetmore reduced his fee. So did Stringer.

Finding of Fact VI in the Stringer case is "That there was an over-reaching of Robert L. Kemp by the defendant, by the defendant taking advantage of Robert L. Kemp's fear, ignorance and lack of experience in the attorney-client relationship."

Barber alleged all the same facts in a suit to cancel the note, in almost the identical language. See opinion in the *Jetmore* case, page 524.

Jetmore informed his client of the seriousness of the charge and the possible penalty that might be imposed. So did Stringer.

In the Oregon case the client was claimed to be unable to understand the English language and the terms of the agreement. Kemp was a taxi-driver, familiar with the experiences of other drivers charged with white-slavery, a man of more than ordinary intelligence, read and spoke English, and in no way incapacitated from making a contract.

In the Oregon case the defendant was a Spanish Basque, against whom there was a prejudice in the community, which fact made the case against him more difficult to defend and was considered by the Supreme Court in upholding the contract.

Likewise, in the Stringer case, Kemp was informed that his being a taxi-driver made the case more difficult.

The Supreme Court stated in the Oregon case,

> "It will be remembered that the contract between Barber and Jetmore contemplated all possible exigencies of the case, * * * and while the fee charged seems large * * * we cannot, as a matter of law, hold that, in view of all possible contingencies as they appeared at the time, it was so exorbitant as to be unconscionable." Opinion, *Barber v. Jetmore,* pp. 525, 526.

In the trial Court's opinion on which the Findings of Fact are based is a Statement of Facts, Tr. Vol. I, pp. 111-125. On pages 114, 115 of this Statement of Facts the Court states:

> "* * * However, there is no question as to the fact that the merits were gone into fully at the first meeting of Kemp and Lewis at the defendant's office. Kemp, defendant and all of his witnesses state that Kemp was then advised of the seriousness of the crime with which he was charged; of the fact that since he was a taxi-cab driver and since at that time there was a drive on in the City of Anchorage to apprehend as many taxi-cab drivers as possible for infractions of the law, particularly in white slave cases, the situation was more serious for him; that there was a very good chance that the grand jury would indict him; and that he would have to go to trial and would have to serve time if convicted. At the same time the defendant was informed of the manner in which the complaining witness was dispatched by Lewis to go to Joe's Lower Level and pick up a fare in the ordinary course of business, and that there was a dispatch sheet available to confirm this fact."

The matter above quoted is a correct statement of what occurred in Stringer's office preliminary to the setting of the fee of $2,500.00 for the defense of the case.

Every fact stated is paralleled by the facts stated by the attorney for the defendant in the *Barber-Jetmore* case preliminary to the setting of the fee of

$5,000.00. Everything stated was what the attorney's duty to his client required him to state.

> "The validity of a contract or retainer, in whatsoever form or howsoever effected, whether sought by client or lawyer, is determined by the same rules of law as other contracts; and, having the mutual assent of the parties, it withstands impeachment, unless unlawful; i.e.: (1) contrary to the public law; (2) contrary to positive morality; (3) contrary to public policy. Weeks' Attorneys at Law, Sec. 364."
>
> Cited in *Beck v. Boucher,* 195 P. 996.

> "The presumption against validity of a contract entered into by parties under the relationship of attorney and client does not attach to a contract by which the relation is originally created and the compensation of the attorney fixed. In agreeing upon the terms of such a contract, the parties deal at arm's length. Cooly v. Miller & Lux, 105 P. 981, Hicks v. Drew, 49 P. 189, Boardman v. Crittenden, 198 P. 1020."
>
> Cited in *Bonelli v. Conrad,* 37 P. (2d) 141.

According to cases cited in the brief of the United States Attorney, the Courts seldom resort to disciplinary proceedings to determine the validity of contracts between attorney and client, at least not while an action is pending or impending to enforce the contract. Nor even when a suit for attorney's fees is determined adversely to the attorney, is resort had to disciplinary proceedings, except where there appears

to have been elements of fraud and overreaching and the fee charged so exorbitant as to shock the conscience.

The foregoing is especially applicable to the situation presented in the case at bar. At the time the disciplinary proceedings were instituted against Stringer, there was an action impending. Kemp had consulted an attorney in regard to the defense of an impending suit for attorney's fees, which undoubtedly would have been commenced if the disciplinary proceedings had not intervened and all the facts concerning Stringer's employment would have been brought out before a court and jury. The result of the trial would have enabled the Court and the United States Attorney to have determined whether or not disciplinary proceedings should have been brought.

Rule 52(a) of the Federal Rules of Civil Procedure provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

This rule is not now construed to mean that any testimony at all, a scintilla, is sufficient to support the findings.

> "Circuit Court of Appeals is bound by the material facts found by District Court if supported by substantial evidence, but not otherwise."
>
> *Automotive Maintenance Mach. Co. v. Instrument M.F.G. Co.,* 143 F. (2d) 332, Syllabus 1.

"Under rule that findings shall not be set aside unless clearly erroneous a finding of fact is clearly erroneous if it is against the clear weight of the evidence, and it does not suffice that it is supported by evidence."

Fleming Adm'r v. Palmer et al., 123 F. (2d) 749, Syllabus 1, Opinion, Page 759.

"It is axiomatic that uncontradicted testimony must be followed. The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others."

Grace Bros. v. Commissioner of Internal Revenue, 173 F. (2d) 170, Opinion, Page 174 (5, 6).

"When case was heard on oral evidence by an experienced judge, findings should not be set aside."

Steinfeldt v. Haymond, 175 F. (2d) 769 (3).

"Where the evidence is conflicting Circuit Court of Appeals is bound by the findings of trial judge if supported by substantial evidence in the absence of prejudicial error in disregarding competent evidence."

Moore Bros. Const. Co. v. City of St. Louis, 159 F. (2d) 586 (1).

Judgment reversed on ground of trial court disregarding competent evidence. Same, Opinion, p. 587 (1).

V.

CONCLUSION.

Counsel for appellant contend that Herald E. Stringer did not get a fair trial nor in fact any trial. That the proceeding against him in the district Court was but the semblance of a trial, a formality necessary to give the trial judge jurisdiction to pronounce judgment.

Rule 52(a) does not vest in the trial judge arbitrary and absolute power. "Clearly erroneous" means not supported by substantial evidence, and "due regard to the opportunity of the trial Court to judge of the credibility of witnesses" means *due* regard, and nothing more.

It has been shown that there was not substantial evidence to support any Finding of Fact to which exception was and is taken. That the whole case depended on the testimony of Kemp denominated the "one important government witness" in the government's trial brief. Tr. Vol. IV, p. 947.

Kemp was impeached by the Chief Deputy Marshal and the Chief of Police as to his moral character and credibility, and by his own contradictory statements.

Judge McCarrey seems to have illogically considered this unimportant, that if notwithstanding this impeachment he disbelieved the defense witness, it followed as a matter of course that facts contrary to their testimony were established, without the support of credible evidence.

There was not a shred of evidence to support Finding of Fact VII, that Lewis was Stringer's agent. All the evidence is to the contrary.

Herald E. Stringer was found guilty of over-reaching, of cheating a client, the most reprehensible offense a lawyer can commit. He was suspended from the practice of law for one hundred and twenty days.

Counsel for appellant contend that Judge McCarrey was not concerned with the severity of the punishment, provided it was sufficiently severe to satisfy the public that he had not paid off a political obligation. He did so convince the public and had little further concern.

Stringer was granted a stay pending appeal and permitted to enjoy what law practice he could get, having been advertised as dishonorable by the judgment of the Court.

Nor is Mr. Stringer chiefly concerned with the severity of the punishment. This appeal is not taken from the sentence. It is taken from the judgment which placed a blot on the appellant's character and professional reputation that can never be completely erased. It can only be outlived.

The consequential damages that Stringer has suffered are inconsequential compared to the disgrace. He has suffered loss of business, he has undergone constant humiliation, worry and anxiety, which, of course, his family has shared, all by a decision of a trial judge without a scintilla of credible evidence to support it.

It is some consolation to appellant that he has saved his self-respect.

While the public may for a time consider him disgraced, he has not in reality been disgraced by the decision of a trial judge, who, in order to bolster that decision for the benefit of the public, has himself violated the law and the Canons of Judicial Ethics, heedless of the consequences to anyone except himself. Counsel for appellant doubt that Judge McCarrey realizes, even to this day, what he has done to Herald Stringer. This consideration saves Mr. Stringer from being embittered, a state of mind which itself is a punishment to the victim of injustice.

In this brief counsel for appellant have handled the facts of the case "without gloves", deeming it their duty to their client so to do. They have attacked the judicial integrity of the trial judge in plain terms, without questioning his personal integrity.

It is submitted that the judgment of the trial Court should be reversed.

Dated, Anchorage, Alaska,
September 30, 1955.

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